

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 02-0140
RESPONSIBLE OFFICER
SALES TAX and WITHHOLDING TAX
For Tax Period 1996

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Issue

Sales and Withholding Tax-Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995).

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The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales and withholding taxes.

Statement of Facts

The taxpayer was an officer of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana for the tax period 1996. After the taxpayer was personally assessed for the taxes, penalties and interest, he timely filed a protest. Pursuant to the request of the taxpayer, the issue was determined based upon the contents of the file. More facts will be provided as necessary.

Sales and Withholding Tax-Responsible Officer Liability

Discussion

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(f), which provides that “In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.”

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. The taxpayer bears the burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b).

The statutes set out two tests that must be met for an individual to be personally responsible for corporate taxes. The first test requires that the taxpayer be an employee or officer of the corporation. In this case, the taxpayer was the vice president of operations. As an officer, the taxpayer meets the first requirement of the test.

The issue to be determined in this case is whether or not the taxpayer had the duty to remit the trust taxes to the state.

The seminal Indiana case considering the personal liability of officers for corporate withholding and sales taxes is Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995). In that case, four investors started a restaurant. One couple, the Safayans, provided most of the capital for the restaurant. The other couple provided the knowledge and experience in the restaurant business. The Safayans delegated the day to day operations of the restaurant to the second couple. After withholding and sales taxes were not properly remitted to the state of Indiana, the Indiana Department of Revenue assessed those taxes, penalty and interest against Mrs. Safayan in her capacity as president of the corporation. The Indiana Supreme Court upheld the assessment.

Pursuant to Safayan at page 273: “The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. The factors considered to determine whether a person has such authority are the following:

1. The person’s position within the power structure of the Corporation;
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and

3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.”

As vice president of operations, the taxpayer was responsible for the plant activities and supervision of personnel involved in the manufacture of the corporation’s product. He was not involved in the financial matters of the corporation. Although he did have check signing authority, he only signed checks on the rare occasion that neither the president or chief financial officer were available and they had specifically authorized the taxpayer to sign the check. He did not sign tax returns or other financial forms. He had no contact with the taxing authorities. He was not involved in the collection of or withholding of taxes. The taxpayer first learned of the corporation’s tax difficulties in approximately October, 1996, when a new accountant was hired. She told the taxpayer that the corporation had not been paying taxes. The taxpayer then approached the president and chief financial officer who acknowledged the tax problem. By then the corporation was financially unable to resolve the tax problem. Shortly thereafter, in late 1996, the corporation filed bankruptcy.

In this case, the taxpayer’s position within the power structure of the corporation did not primarily concern financial matters. The taxpayer’s actual day to day job duties did not concern control of corporate finances. It appears that the taxpayer did not have control of the bank accounts or determining when and in what order to pay creditors. The taxpayer did not meet the criteria set out in the Safayan case to be an officer with the duty to collect and remit withholding and sales taxes to the state.

Finding

The taxpayer’s protest is sustained.

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